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IN THE

Supreme Court of The United States

October Term, 1973

WILLIAM G. MILLIKEN, et al., *Petitioners,*	)	
vs.	)	No. 73-434
RONALD G. BRADLEY, et al., *Respondents,*	)	
ALLEN PARK PUBLIC SCHOOLS, et al., *Petitioners,*	)	
vs.	)	No. 73-435
RONALD G. BRADLEY, et al., *Respondents,*	)	
THE GROSSE POINTE PUBLIC SCHOOL SYSTEM, et al., *Petitioners,*	)	
vs.	)	No. 73-436
RONALD G. BRADLEY, et al., *Respondents,*	)	

BRIEF ON THE MERITS IN SUPPORT OF PETITIONERS SUBMITTED AMICUS CURIAE BY THE STATE OF INDIANA

The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, Donald P. Bogard, Deputy Attorney General and William F. Harvey, Special Counsel for the Attorney General, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, submits its brief amicus curiae in support of the Petitioners in the above-entitled cause.

OPINION BELOW

The opinion below, filed by the United States Court of Appeals for the Sixth Circuit (hereafter Sixth Circuit) is reported as *Bradley v. Milliken*, (6th Cir., 1973) 484 F.2d 215 (Certiorari Joint Appendix pp. 110a-240a) (hereafter cert. app.).

JURISDICTION

The United States Supreme Court has jurisdiction to review this case by writ of certiorari pursuant to 28 U.S.C. § 1254(1), and has accepted it for such purposes by granting said writ on November 19, 1973.

CONSENT OF PARTIES

This amicus brief by the State of Indiana is filed pursuant to Rule 42 of the Rules of the United States Supreme Court and consent of the parties is not required pursuant to Rule 42(4).

QUESTIONS PRESENTED

I.

Whether, in a school desegregation case involving a metropolitan area in which one school system has been found to be *de jure* segregated and all other districts found not to be de jure segregated, a federal district court can enter orders regarding the transfer or exchange of pupils, against those other school systems or districts which are geographically close to the segregated system when there is no finding against those school systems or districts, no finding that they were formed as a part of a state supported *de jure* segregated system, and no finding that they exist in order to perpetuate such a system, when those

orders have the effect of developing massive busing and student transfer programs among the various districts and which were entered solely to establish a court-acceptable "desegregation" plan in the one segregated school system?

II.

Whether the state can be compelled to entirely reorganize local school districts in metropolitan areas within the state in order to remove only black children from one school system and only white children from another school system and exchange them between systems when only one school system was found to be illegally segregated, when there were no findings against any other school system and when the only alleged "act" of the "State" was purported to have been committed entirely within the illegally segregated system, but which in fact had no causal connection whatever upon racial percentages or numbers in any school system.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in part as follows:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Civil Right Act of 1964, 42 U.S.C. § 2000c provides in part as follows:

§ 2000c. Definitions

As used in this subchapter—

(a) "Commissioner" means the Commissioner of education.

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

(c) "Public school" means any elementary or secondary educational institution, and "public college" means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

(d) "School board" means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system. Pub.L. 88-352, Title IV, § 401, July 2, 1964, 78 Stat. 246.

§ 2000c-6.

(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, . . .

and the Attorney General believes the complaint is meritorious and certifies . . . that the institution of any action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

INTEREST OF THE AMICUS CURIAE

The State of Indiana submits its brief amicus curiae since this case involves similar questions of law to a case arising out of Indiana which is currently on appeal to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit). *U.S.A. & Buckley et al. v. Board of School Commissioners of the City of Indianapolis, et al.*, (No. 73-1968 through 73-1984) (hereafter Indianapolis). In that case neither the State of Indiana nor the Indiana General Assembly were named parties. However, named as added defendants in the court below—the United States District Court for the Southern District of Indiana (hereafter District Court)—were Otis R. Bowen, as Governor of the State of Indiana, Theodore L. Sendak, as Attorney General of the State of Indiana, Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana, and the Indiana State Board of Education, a public corporate body (hereafter State Defendants). The State Defendants were added to the lawsuit after the District Court had made a finding of *de jure* segregation on the part of the Indianapolis Public School System (hereafter IPS), 332 F. Supp. 655, (1971), and which was properly on appeal to the Seventh Circuit at the time the State Defendants and nineteen school districts were added as defendants.

The Indiana case, like the case at bar, is an extremely complex piece of school desegregation litigation involving the transfer or exchange of pupils from IPS which has been found guilty of *de jure* segregation, across township, county, city, and town boundaries to twenty-three other school districts in eight (8) counties found *not* to be guilty of any *de jure* violations.

The State of Indiana, pursuant to its Constitution, Article 8, Section 1 (1851), and statutes duly enacted, has provided for a system of common schools wherein tuition shall be without charge and "equally open to all." The effectuation of those provisions has always been in the development and control of the local schools in the State of Indiana, since school systems are created locally, controlled locally, and are primarily financed locally (by issuance of their own school bonds and the taxation of local property). The function of the State agencies in education, such as the Office of the Superintendent of Public Instruction and the Indiana State Board of Education, is a service function designed to assist the local schools in their various individual programs.

In the Indianapolis Standard Metropolitan Statistical Area (hereafter ISMSA) there are 44 independent school systems with a total 1972 enrollment of approximately 261,482 school children. Twenty-one (21) of those school systems are now involved in litigation in the District Court and in the Seventh Circuit in a case which is similar to this case. The enrollment of those twenty-one (21) school systems for 1972 was approximately 205,175 school children. (attached appendix following p. A-63).

The disposition of the Detroit case in the Sixth Circuit has caused a very serious threat to the continued existence of the school systems in the ISMSA, many of which have existed in their present or predecessor form since before the Civil War, and as early as 1838.

The primary interest of the amicus is in explaining to this Court how the Detroit case affects those Indiana school systems, and why the Sixth Circuit in the decision below was incorrect and should be reversed.

The purpose of the amicus is also to suggest to this Court that the decision now presented for review is of a signifi-

cance which equals that of *Brown v. Board of Education*, 347 U.S. 483 (1954). The result here can have the effect of placing almost the whole of metropolitan development in the United States under a federal judicial superintendency, and such a case previously has not been before this Court. This effect has staggering implications, as is evident from examining the attached United States Bureau of Census Charts of urbanized areas in Indiana, Illinois and Michigan from the 1970 census (attached appendix following p. A-63).

The amicus brief is limited in its primary discussion to that part of the Court of Appeals opinion which permits the development of a "Metropolitan Area Desegregation Plan,' 484 F.2d 215, 250 Cert. App. at page 173a, for the Detroit Metropolitan area.

In this case, unlike *Keyes v. School District No. 1*, 93 S.Ct. 2686 (1973), there are multi-school districts involved, against which no finding of racial discrimination has been entered, but like *Keyes*, there was a finding of discrimination in one school district. Unlike *Bradley v. School Board of Richmond, Virginia*, 462 F.2d 1058 (4th Cir. 1972), aff'd, 93 S.Ct. 1952 (1973), there is no history of racial discrimination in the additional school district defendant-intervenors, and no finding that the out-of-Detroit City schools are or ever have been anything other than integrated school systems. Similar to *Richmond* is the percentage of blacks in the city school systems, with the Detroit School City being about 64% black, and Richmond about 70% black. Also, as in *Richmond*, the Detroit school city can desegregate now and eliminate racially identifiable schools. In the *Indianapolis* case, *the IPS schools are 40% black and 60% white.*

This case commenced as a school desegregation case against the Detroit City School system, and the district court wishes to end it as a case which alters the racial imbalance between that school system and the added defendant-intervenors. In that way it is much like the *Indianapolis* case (see attached Appendix, pp. 11 and 12), and much like *Spencer v. Kugler*, 326 F.Supp. 1235, (D.N.J. 1971), aff'd, 404 U.S. 1027 (1972), in which this Court rejected an attack made upon the racial imbalance found in New Jersey school systems.

The essential fact in this case is not that the Detroit City schools were segregated, according to the district court, but that the added school systems were not found to be segregated. Those school systems are to carry the judicial burden. They were not heard, were not tried, and were not present at trial; no evidence was offered against them, and no findings were made against them. Nevertheless, they are the subject of the district court's orders in Detroit.

The critical factual difference between this case and *Indianapolis* is that in the *Indianapolis* case, after IPS had been found to be guilty of *de jure* segregation in the first lawsuit (see attached appendix p. A-5) and had appealed that finding to the Seventh Circuit, the added school defendants and the State Defendants were brought into court in a second lawsuit (see attached appendix p. A-6) by a Complaint in Intervention and an Amended Complaint in Intervention and did present evidence, did have an opportunity to cross examine, and *those added school districts were found not to be segregated school systems.* Nevertheless, principally on the basis of the Sixth Circuit's decision in this case (see attached appendix, p. A-22) orders were entered against the added school districts. In the most

recent district court entry in *Indianapolis* (see Supplemental Decision, attached appendix, p. A-61) the court has "delayed" action (as in Michigan), pending action by the Indiana General Assembly, and if the General Assembly "defaults" then the district court has stated it will act. As in *Michigan* there was no constitutional violation by any added defendant school district, but substantial orders have been entered against them which have been vacated, but which on February 16, 1974, will rise in an even greater magnitude than as originally ordered.

A.

Michigan

There are two categories of defendants in this case when examined pursuant to the requirement that a constitutional wrong be found. First, there are the state defendants; the Governor, the Attorney General, the State Board of Education, and the Superintendent of the Detroit Public Schools. The district court entered findings of *de jure* segregation against the Detroit City defendants, with involvement by the State of Michigan officials, 338 F.Supp. 582, aff'd, 484 F.2d 215, 258 (1973), Cert. App. 189a.

Secondly, there is the "Wayne, Oakland, and Macomb counties group," which consists of 53 separate and independent school systems. This group includes 780,000 school children and their parents, and could possibly include as many as 85 separate and independent school systems with an enrollment of approximately 1,000,000 pupils covering an area of approximately 1,952 square miles (Petition for Certiorari, Michigan, pages 5, 19, 52). Against this group, except for the School City of Detroit, there were no findings of illegal segregation entered, and in fact no such findings at all.

Nevertheless, because that group of school systems and school children exist in close proximity to the Detroit Public Schools they were made available for effecting a Detroit remedy. In short, a remedy has been imposed without a wrong. Compare, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

B.

Indiana

The Indianapolis case commenced on May 31, 1968, when the United States of America filed a Complaint in the District Court which was assigned cause number IP-68-C-225. The action by the United States was brought pursuant to 42 U.S.C. § 2000c-6(a) and (b), and was tried by the Court on July 12-21, 1971, Defendants in the aforementioned complaint were The Board of School Commissioners of the City of Indianapolis, Indiana, its Superintendent of Schools, and members of its Board.

On August 18, 1971, the Court issued its "Memorandum of Decision" permanently enjoining defendants, their successors in office, officers, agents, employees and all those in active concert or participation with them from "discriminating on the basis of race in the operation of the Indianapolis School System," and further ordered the defendants to take seven steps to "fulfill their affirmative duty to achieve a nondiscriminatory school system." 332 F. Supp. 655, 680. Affirmed 474 F.2d 81 (7th Cir., 1973). Cert. denied 407 U.S. 920, 93 S.Ct. 3066 (1973).

A part of the District Court's findings in the first Indianapolis case was that that school board constructed three high school buildings in 1961, 1963, and 1967, the placement of which constituted acts of *de jure* segregation.

On September 10, 1971, the defendants filed their Notice of Appeal [redacted] from the final judgment entered on August 18, 1971.

On September 14, 1971, a "Motion to Intervene as Party Plaintiff" and a Complaint in Intervention were filed by Donny Brurell Buckley and Alycia Marquese Buckley who purported to intervene as representatives of a class comprised of Negro school age children in Marion County, Indiana who attended only IPS.

On October 21, 1971, an Amended Complaint was filed by intervening plaintiffs which named Edgar D. Whitcomb, as Governor of the State of Indiana, Theodore L. Sendak, as Attorney General of the State of Indiana, and The Indiana State Board of Education, a public corporate body, as added defendants. Jurisdiction under the Amended Complaint was extended to include 42 U.S.C. §§ 1983 and 1988, 28 U.S.C. §§ 1343(3), 2201 and 2202, and the Fourteenth Amendment to the United States Constitution.

A trial was held on the Amended Complaint and Answers thereto on June 12, 1973 through July 6, 1973, and was reopened by the court on its own motion on July 18, 1973. In that trial the parties were as follows:

1.

Indianapolis Public School System
Marion County, Indiana

The IPS system is one of eleven (11) in Marion County, Indiana, and is the twenty-nineth largest in the United States. In its 1972-73 enrollment the IPS system had 97,833 students with a *racial composition of 60 percent white and 40 percent black.* If reorganized utilizing all available students in the ISMSA it would be the fifth largest school district in the United States, fitting between Philadelphia and the current Detroit system.

Seventeen days before the commencement of the second trial, the District Court held its findings in the first trial were res judicata in the second trial, hence the findings against IPS stood as before.

2.

State Officials in Indiana

In the second trial the intervening plaintiffs added the Governor, the Attorney General, the Indiana State Board of Education, and the Superintendent of Public Instruction as added defendants. Findings were entered against only the latter two parties, and those findings were that the findings against IPS in the first trial, i.e., that the placement of three high schools constructed in 1961, 1963, and 1967, constituted acts of *de jure* segregation which were "imputed" to the state officials because there was in the State Board of Education a power to review and approve site selections for purposes of insuring minimum health and safety standards. These were the only findings against any State officials in Indiana. (Attached appendix, p. A-22)

3.

Additional School Districts Within Marion County, Indiana

There are ten (10) school systems located in Marion County, Indiana, in addition to IPS. Of those, eight (8) are township schools and two are school systems for the City of Beech Grove, Indiana and the Town of Speedway, Indiana. Their combined enrollment in 1972-73 was approximately 77,611 school children. These school systems have never been illegally segregated nor have they ever operated dual school systems, and the District Court so found. (Attached appendix, p. A-23).

Additional School Districts Outside Marion County, Indiana

There are ten (10) school districts located outside Marion County, Indiana, in six (6) other counties, which were never a part of any Marion County school system, and which, in several instances, have existed since before the Civil War. Their combined 1972-73 enrollment was approximately 27,131 school children. These schools have never been segregated nor have they ever operated dual school systems, and the District Court so found. (Attached appendix, p. A-23).

On July 20, 1973 the District Court issued its "Memorandum of Decision." See attached Appendix, p. A-1. In that Decision the Court found acts of *de jure* segregation on the part of the Indianapolis Public Schools in the placement of three (3) high schools, and that those acts were imputed to the Indiana State Board of Education and the State Superintendent of Public Instruction. However, the Court found that there were no *de jure* acts of segregation attributable to the added defendant school districts. The District Court also found that the desegregation of the Indianapolis Public School System cannot be accomplished with its own boundaries primarily because of the possibility of resegregation "within a matter of two or three years."

The District Court in the *Indianapolis* case stated that it was possible to desegregate IPS within its own boundaries, stating at page 7 of its Decision:

> "In other words, it is apparent that as a sheer exercise in mathematics, it would be possible for this Court to order desegregation of IPS on a 58.9%-41.1% basis, or some basis similar thereto, so that no school could, for the time being, be racially identifiable as a black school . . ." (attached appendix p. A-12).

But, contrary to *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968) and *Swann v. Charlotte-Mecklenburg Board of Education, supra*, the District Court was not looking for a plan that promises realistically to work *now*, but one that promises to work for all time.

Further, in that Decision, the District Court stated in Conclusion of Law number 2 on page 22 (attached appendix, p. A-26):

> "The Superintendent of Public Instruction, The Indiana State Board of Education, and other responsible agents and agencies of the State of Indiana, and the State itself, have each practiced *de jure* segregation, both by commission and omission."

yet the Court never ordered any of the above to do any specific acts.

In part V, page 17 of the Memorandum of Decision (attached appendix, p. A-23), the District Court stated:

> "There was no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders."

yet the Court ordered that each of the added defendant school corporations was directed to accept Negro transfer students from the Indianapolis Public Schools at the rate of 5% of their 1972-73 enrollment, except for Washington Township and Pike Township where the rates were 1% and 2% respectively.

Also, the Indianapolis Public School system was ordered to rearrange the enrollment patterns of its elementary schools so that each school, at the beginning of the 1973-74 school year, had a minimum Negro enrollment of 15%.

Four (4) separate motions for stay of the order of July 20, 1973 were filed by the defendants and added defendants before August 6, 1973, and on August 8, 1973, in open court, the District Court orally stayed said order as it pertained to the transfer of IPS students to the added defendants, but did not stay that part of the Order that pertained to the Indianapolis Public Schools.

Notices of appeal were filled by the original defendants and all added defendants by August 16, 1973. However, on September 4, 1973, the Court granted intervening plaintiffs' motion for leave to interplead a second class of added defendants, and another Amended Complaint was filed on that date. The United States of America, the Original plaintiff, filed its notice of appeal on September 18, 1973.

Briefs were filed in the Seventh Circuit by all appellants on or before December 10, 1973. However, on December 6, 1973, the District Court issued its "Supplemental Memorandum of Decision" (hereafter Supplemental Decision) which vacated the orders in the July 20, 1973, Decision that had been stayed on August 8, 1973, regarding the transfer of pupils from IPS to the added defendant School Districts. See attached appendix, p. A-39. In that Supplemental Decision the District Court gave the Indiana General Assembly until the end of the 1974 legislative session or February 15, 1974, whichever comes first, to enact a metropolitan school desegregation plan. If the General Assembly should "default" in its "duty" to find a permanent solution to the desegregation of IPS into twenty-three (23) separate and distinct school districts found not to be guilty of any *de jure* segregation, then the District Court will devise its own plan.

Thus, even though neither the State of Indiana nor the General Assembly were parties to the foregoing litigation,

it is certain that if the General Assembly does not enact some type of metropolitan plan which is suitable to the District Court the Court will draft such a plan. Therefore, the Indianapolis metropolitan area faces a major school reorganization which could include eight (8) counties and from twenty-four (24) to forty-four (44) separate and independent school districts with a total pupil population of from approximately 205,000 students to 260,000 students, all of which would be directed by a district court judge whom the State of Indiana would assert is totally without power to so act.

There was no contention made that the Indianapolis Public School system can not now effect a desegregation plan, or that it is not prepared to do so. The Indianapolis federal district court, like Detroit, has involved the additional school system because it wants a plan which once implemented will "work forever" and which will place black students in a perpetual minority in all schools in the Indianapolis metropolitan area.

The District Court further demands this in face of the fact that the IPS system has about 9 percent of the entire assessed school valuation for the State of Indiana, and that it has the financial capacity to raise over $100,000,000 for the construction of new schools, should it decide to do so. (See attached appendix following p. A-63).

In short, that the IPS system can now desegregate is not contestable. The concern of the District Court was that it might not work forever, and it has entered orders against the additional school defendants after finding that they did not commit acts of discrimination and were not illegally segregated or de jure segregated school systems.

C.

Indiana and Michigan Compared

First, concerning the additional school defendants in these cases, in Michigan there was no evidence and no findings against those school systems. In Indiana the District Court found that they were not *de jure* segregated systems. In each case the district court has either entered orders against them, or will do so, regardless of the absence of evidence or the finding of no discrimination by them.

Secondly, concerning the state school boards and officials, in Indiana the only connection with the "State" (which was never a party to the action) was the site approval given to three high schools in the IPS system. In Michigan, the principal connection was the enactment of a statute affecting the Detroit Public School system. In neither case was there any showing that the "state acts" had any causal connection to the racial composition of either school system, and there was of course no showing, nor could there have been, that in either Michigan or Indiana the "state acts" had any effect in any other school district in either the Detroit or Indianapolis area. In neither case is the argument made that the existence of the school district themselves caused racial discrimination and segregation, or that they were created for those purposes or to impede the removal of the vestiges of a dual system. The Sixth Circuit held however, that the absence of a dual system among school districts was insignificant, because it "follows logically that existing boundary lines cannot be frozen for an unconstitutional purposes" 484 F.2d at 250.

The above-quoted statement is of course true. But either the Sixth Circuit's statement has no relevance to this case,

or, if it remains a controlling holding, the fact that the added school defendants in Detroit were not found to be dual school systems is no longer significant to this type of litigation. If this is to become the law from this Court, then federal equity power in this type of litigation is no longer founded upon the duty to desegregate, after a finding of illegal state compelled segregation.

D.

The Metropolitan Remedy

The essential fact in the Indiana case is not that the Indianapolis Public School system was illegally segregated, or that it can now be desegregated. It is that the additional school district defendants were not segregated and the district court entered a finding to that effect. After that finding it entered orders against them.

The process by which this was accomplished was the same process used by the district court in Detroit. It is as follows: (1) education is a state public function because it is developed pursuant to state law from the state governmental power; (2) acts by state officials are public acts; (3) acts by local school boards are imputable to state education officials, whenever they occur with or without knowledge on the part of the state education official; (4) when the imputed act has occurred, or when a de jure act is taken by the state official or legislature, then the district court has judicial power over the public function of education in as many school systems as are "conveniently" reached by a school bus; and (5) that that power will be asserted unless the state acts in a way consistent with the district court's desire.

The district court in Detroit would effect a metropolitan remedy ["provided, however, that existing administra-

tive, financial, contractual, property and governance arrangement shall be examined, and recommendations for their temporary and permanent retention or modification shall be made * * *'' 345 F.Supp. 914, at 919, aff'd but partly vacated, 484 F.2d at page 252 (1973)], and the district court in *Indianapolis* would effect the same type of remedy, (see attached appendix, p. A-61).

This will occur not because of segregation in the school systems in those two cities, nor because among those systems segregation existed, nor because they were created to effect racial discrimination. It will occur, in fact, because those district courts believe it is desirable to submerge black students forever in a minority status in the public school systems in the respective areas. See attached appendix, pp. A-12 and A-58.

The White-Majority Thesis has been rejected in *Brunson v. Board of Trustees,* 429 F.2d 820, 826 (4th Cir. 1970) (Judge Sobeloff, concurring):

> "The invidious nature of the Pettigrew thesis, advanced by the dissent in the present case, thus emerges. Its central proposition is that the value of a school depends on the characteristics of a majority of its students and superiority is related to whiteness, inferiority to blackness. Although the theory is couched in terms of 'socio-economic class' and the necessity for the creation of a 'middle-class milieu,' nevertheless, at bottom it rests on the generalization that, educationally speaking, white pupils are somehow better or more desirable than black pupils."

Thus, the essence of this case, as well as the case in Indianapolis, is whether the federal judiciary shall remove local control of school systems and school districts, even in the absence of racial discrimination in those schools, because there is a heavy black enrollment (40% black in Indian-

apolis and 64% black in Detroit) in the city school system involved in the litigation which itself may or may not be a segregated system. Compare, *Northcross v. Bd. of Ed. Memphis, Tenn.*, No. 73-1954; No. 73-1667 (6th Cir., Dec. 4, 1973).

Plaintiffs in such cases will ask for the consolidation and the redistricting of schools, and for the busing of students to and from systems which were not segregated. That will mean disregarding governmental boundary lines, not only for pupil placement but for teacher assignment, for building construction and the taxable base which supports that construction, and for both administrative and voter control also.

These cases would instigate a more major political and social upheaval than the progression either from the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), to the "separate is inherently unequal" doctrine of *Brown I, supra*, or from "freedom of choice" of the post-Brown era to the "affirmative duty" of *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968), *Swann, supra*, and *Keyes, supra*.

STATEMENT OF THE CASE

The amicus accepts the statement of the case as set out by Petitioners on brief to this Court.

ARGUMENT

I.

A FEDERAL DISTRICT COURT DOES NOT HAVE THE POWER TO ORDER THE TRANSFER OR EXCHANGE OF STUDENTS FROM ONE SCHOOL DISTRICT FOUND TO BE GUILTY OF DE JURE SEGREGATION ACROSS POLITICAL BOUNDARIES TO OTHER SCHOOL DISTRICTS FOUND NOT TO BE GUILTY OF ANY DE JURE VIOLATIONS

In *Swann, supra,* this Court clearly established the power of a district court in a school desegregation case, stating at page 16:

> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that *judicial powers may be exercised only on the basis of a constitutional violation.* Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters *only* when local authority defaults.
>
> . . . As with any equity case, *the nature of the violation determines the scope of the remedy. . . .*"
> (Emphasis supplied.)

Thus, in this case this Court must examine what the Sixth Circuit apparently determined was a constitutional violation, and in so doing this Court will find that there were no findings entered against the out-of-city schools. Those schools were simply brought in to effect a remedy, i.e., the Sixth Circuit says that the Detroit Schools cannot be desegregated within their own boundaries, therefore the

boundaries have to be extended to bring in other school districts. And the fact that those added districts had not committed any constitutional violations was immaterial to the Sixth Circuit.

A similar situation exists in Indianapolis, except that the District Court there went so far as to enter a finding that none of the added defendant school districts was guilty of any discrimination (attached appendix p. A-23). But after making that finding that District Court proceeded to use those districts to effect its remedy to desegregate IPS.

In *Bradley v. School Board of City of Richmond, Virginia, supra,* the Fourth Circuit said at page 1069:

> "Because we are unable to discern any constitutional violation in the establishment and maintenance of these three school districts, nor any unconstitutional consequence of such maintenance, we hold that it was not within the district judge's authority to order the consolidation of these three separate political subdivisions of the Commonwealth of Virginia. . . ."

See also *Spencer v. Kugler, supra.*

Therefore, it is quite clear that the Sixth Circuit is attempting to impose a remedy upon school districts that are not guilty of any constitutional violations, and that attempt must be reversed by this Court pursuant to *Swann, supra, Bradley v. School Board of City of Richmond, Virginia, supra,* and *Spencer v. Kugler, supra.*

II.

THE FOURTEENTH AMENDMENT DOES NOT REQUIRE A STATE TO REMOVE BLACK CHILDREN FROM SCHOOLS IN WHICH THEY CONSTITUTE A MAJORITY OF THE STUDENTS ENROLLED, OR A SUBSTANTIAL MINORITY, IN ORDER TO MIX THEM WITH WHITE CHILDREN IN OTHER SCHOOL DISTRICTS, SO THAT THE BLACK CHILDREN WILL ALWAYS BE IN A RACIAL MINORITY.

The gist of the constitutional understanding which the District Court had in Detroit was clearly stated by that court:

> "In reality, our courts are called upon, in these cases, to attain a social goal, through the educational system, by using law as a lever." 484 F.2d at 261; Cert. App. 41a.
>
> . . .
>
> "To use the vernacular, 'Right on!' but steady as we go." Cert. App. 41a.

That certainly is not an accurate statement of the law in school desegregation cases as established by this Court.

A.

THE CONSTITUTIONAL DEFINITION

The cases governing the district court here are, of course, found from *Brown I, supra* to *Keyes, supra:*

> The constant theme and thrust of every holding from Brown I to date is that state-enforced separation of the races in public schools is discrimination that violated the Equal Protection Clause. ***The remedy commanded was to dismantle dual school systems.***
>
> . . .

"We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems . . . *The target of the cases from Brown I to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities.* One vehicle can carry only a limited amount of baggage. (Emphasis supplied). *Swann*, 402 U.S. at 22.

In discussing the extent of the remedy, the Supreme Court in *Swann* made the following observations at page 24:

. . . If we were to read the holding of the district court to require, as a matter of substantive constitutional law, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. *The constitutional command to desegregate schools does not mean that every community must always reflect the racial composition of the school system as a whole.'* (Emphasis supplied.)

And at pages 31 and 32:

At some point, these school authorities and *others like them* should have achieved full compliance with this Court's decision in Brown I. The systems will then be 'unitary' in the sense required by our decisions in Green and Alexander.

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies * * * (Emphasis supplied.)

In this case there was no finding that the State attempted to fix or alter demographic patterns so as to affect the

racial composition of the schools in the Detroit area or in Michigan in general. Likewise, there was no finding that the school corporations were established for that purpose, or that they effected that purpose and were intended to do so. Compare *Keyes v. School District No. 1*, 93 S.Ct. 2686, at 2696 (1973).

In short, in *Brown I, supra*, this Court struck down a governmental policy of racial segregation which was effected in the public school system. The Court did not then, and has not since that time used the Fourteenth Amendment to develop educational policy.

Brown was a case which struck at a government developed racial-social policy of segregation and discrimination in the public schools. Such governmental policies meant inherent inequality which was developed and effectuated, in part, by use of public school system. Thus, this Court said, "The target of the cases from *Brown I* to the present was the dual school system." *Swann, supra* at 22.

But the use of the public school system to develop and promote a governmental policy of racial segregation was only a part of the systematic program. It occurred and was struck down in public parks, *Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971 (1954), in and on public beaches and bathhouses, *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955), municipal golf courses, *Holmes v. City of Atlanta*, 350 U.S. 879 (1955), and on municipal buses, *Gayle v. Browder*, 352 U.S. 903 (1956), all on the authority and the concept of the *Brown* decision.

The cases which hold that for a *Brown* violation there must be a state act in creating racial segregation or illegal separation, rather than adventitious development or demographic qua social alterations, are simply legion. Among them are: *Keyes v School District No. 1, supra; Spencer v.*

Kugler, supra; Bradley v. School Bd. of Richmond, Virginia, supra; Springfield School Committee v. Barksdale, 348 F.2d 261, 264, (1st Cir. 1965); *Offerman v. Nitkowski,* 378 F.2d 22 (2nd Cir. 1967); *Sealy v. Dept. of Public Instruction,* 252 F.2d 898 (3rd Cir. 1957), certiorari denied, 356 U.S. 975 (1958); *Deal v. Board of Education,* 369 F.2d 55 (6th Cir. 1965); and *Downs v. Board of Education,* 366 F.2d 988 (10th Cir. 1964), certiorari denied, 380 U.S. 914.

B.

A SCHOOL BOARD'S DUTY

The duty of school officials to date has been to remedy segregation which has occurred within a single district, or to cross school district line for purposes of desegregation when districts were established as a part of a dual school system; *Haney v. County Board of Education of Sevier County.* 410 F.2d 920 (8th Cir. 1969); or were set up to impede the dismantling of a dual school system; *Wright v. Council of Emporia,* 407 U.S. 451 (1972); or where the state actively imposed its power to prevent the dismantling of a dual school system within a single district; *Lee v. Macon County Board of Education,* 448 F.2d 746 (5th Cir. 1971); Cf. *Bradley v. School Board (Richmond),* 462 F.2d 1058 (4th Cir. 1972), aff'd *per curiam* by an equally divided court, 36 L.Ed.2d 771, 93 Sup. Ct. 1952 (1973).

Once school officials have taken the necessary action within their respective school corporations to insure that schools under their control are not racially identified either as "white" or "black" as compared to each other on account of discriminatory acts by school or state officials their constitutional duty has been considered to be at an end. *Swann, supra,* 402 U.S. 16, 28, 31-2. To combine city and county schools "by judicial fiat" has been expressly de-

nied as a matter for "legislative, executive or political resolution." *Mapp v. Bd. of Ed. of Chattanooga*, (E. D. Tenn. 1971), 329 F. Supp. 1374, 1378, aff'd per curiam (6th Cir. 1973) 477 F.2d 851. Compare, *Higgins v. Bd. of Ed. City of Grand Raids, Mich.*, No. CA 6386 (W.D.Mich. July 18, 1973).

C.

THIS CASE AND THE NEW CONSTITUTION FOR METROPOLITAN AMERICA

The new duty imposed by the Court in the instant case is one that would require the mixing of races wherever found within a metropolitan area so that only "white-majority" districts would be maintained. This cannot be done by a single district in all cases, and where it cannot, the Court would require a substantial redefinition of the constitutional duty owed under the Fourteenth Amendment to each minority child in a city. To date, the school function and the overall supervision of schools and their basic governmental structure have been determined by the State; their boundaries have been set with reference to historical entities; and the detailed operation and the myriad of factors involving virtually all of the items described in *Keyes, supra*, are delegated to school districts with plenary corporate powers. This is vividly described in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 36 L.Ed. 2d 16 (1973), where state educational financing schemes faced a comparable challenge in the state relationship to its governmental units. Any such attempt to reorder the structure of school government has heretofore been "reserved for the legislative processes of the various States." *Rodriguez, supra*, 36 L.Ed. 2d 16 at 57.

The imposition of such a new duty will require courts not only to balance integrative necessities against travel time and its effect on the educational system, but also with prescribing necessary black-white ratios and enrollment; geographic size and school board organization; and the distribution of assets, debt, teachers, and tax base for each unit in each school district in the entire metropolitan area.

The Sixth Circuit's point of view is a call for busing and total school reorganization for racial balance, and is clearly contrary to the cases where majority-black schools and majority-black school systems have been approved. See *Wright v. Emporia, supra* (66% black); *Bradley v. School Board of Richmond, Virginia, supra* (69% black); *Northcross v. Board of Education of Memphis City Schools,* 397 U.S. 232 (1970) (53.6% black) (341 F. Supp. at p. 586); *Raney v. Board of Education of Gould School District,* 391 U.S. 443 (1968) (60% black); *U.S. v. Scotland Neck City Board of Education,* 407 U.S. 484 (1972) (78% black); *Brunson v. Board of Trustees of School District No. 1 of Clarendon County, supra* (90% black). In addition, busing solely for purposes of racial balance is proscribed by the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a).

Further, the trial court and the Sixth Circuit in the majority opinion erred by basing the remedy on the overall right of the State to control the methods of education. The real issue is not whether education is a "state power" or "local power" but whether a Federal court should respect the right of the states to structure their internal government under the Tenth Amendment to the United States Constitution.

It is submitted that this structure of State government should not be destroyed where the concentration of blacks within the inner-city was caused by a variety of factors including in-migration, birthrates, income factors and per-

sonal choice. Where such concentration of blacks was not caused by State action, the internal structure of the State has been respected. See, e.g., *Spencer v. Kugler, supra.*

CONCLUSION

A decision to mandate a metropolitan "solution" is basically a political and social decision—a major untried change in ordering human affairs, at least as far as the Federal Judiciary is concerned.

However, the nation as a whole has chosen to administer its schools in relatively small governmental units as is evidenced by the following chart showing the number and percent of school districts by size in the United States:

Pupils	Number of Districts	Percentage of Districts
25,000 and over	180	1.001%
10,000 to 24,999	538	2.992%
5,000 to 9,999	1,096	6.095%
2,500 to 4,999	2,026	11.268%
300 to 2,499	7,911	43.998%
Under 300	6,229	34.644%

(Source: Digest of Educational Statistics, 1971 Ed. United States Dept. of H.E.W.)

One can paraphrase *Rodriguez:* the concept of this case, after it has mutated in the Court of Appeals, is a challenge to the manner in which states choose to educate children, an area in which the federal and state courts lack expertise and familiarity, where educators are divided on many of the problems of reorganization and where it would be difficult to imagine a rule having a greater potential impact on the federal system.

Finally, it must be said that these opinions below do not advance the cause of human dignity, human freedom, or human choice. They greatly retard those critical elements of a free society and this appears to have occurred because the courts have confused the elements of a class action with constitutional rights under the Fourteenth Amendment. The dissenting opinion in the Sixth Circuit captured the essence of the matter, saying:

> "The metropolitan busing remedy order by the Court is, however, unconstitutional on a more fundamental level. It invalidly assumes that the equal protection clause of the Fourteenth Amendment protects groups and not individuals. *The entire thrust of the District Court's order is that the rights of blacks as a group must be redressed and that, in the process, the rights of individual black children (and non-black children) may be disregarded.*" 484 F.2d at 265. (Emphasis supplied.)

WHEREFORE, for all the above and foregoing, the State of Indiana, amicus curiae herein, respectfully urges this Court reverse the decision of the Sixth Circuit.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

WILLIAM G. MILLIKEN, et al.,

Petitioners,

vs. No. 73-434

RONALD G. BRADLEY, et al.,

Respondents.

ALLEN PARK PUBLIC SCHOOLS, et al.,

Petitioners,

vs. No. 73-435

RONALD G. BRADLEY, et al.,

Respondents.

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM, et al.,

Petitioners,

vs. No. 73-436

RONALD G. BRADLEY, et al.,

Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of December, 1973, three (3) copies of the BRIEF ON THE MERITS IN SUPPORT OF PETITIONERS SUBMITTED AMICUS CURIAE BY THE STATE OF INDIANA were deposited in the United States Mail, first class postage prepaid, addressed to all counsel of record, except that service of the counsel of record residing in excess of five hundred (500) miles from Indianapolis, Indiana, has been made by air mail, postage prepaid.

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